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Source: *Journal of Public Policy & Marketing*, Vol. 16, No. 1, International Issues in Law and Public Policy (Spring, 1997), pp. 2-13
Published by: American Marketing Association
Stable URL: http://www.jstor.org/stable/30000417
Accessed: 20/06/2013 10:58

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Advertising Law in the United States and European Union

Ross D. Petty

Nearly 40% of the more than $270 billion spent on advertising throughout the world occurs in the United States and more than 25% more is spent in Europe (Adler 1996). Both the United States and European Union (EU) have a central government that is the source of marketwide law, as well as numerous states, each with its own individual laws. Although the EU drew on U.S. law when drafting its 1984 Directive on Misleading Advertising, many of its member states have legal traditions predating those of the United States, and they are reluctant to change. The author examines advertising law in both the United States and EU, specifically exploring the law of misleading, comparison, and unfair advertising. Differences between states in each market, the states and central government, and the United States and EU are analyzed to develop implications for both marketers and policy makers.

Nearly 40% of the more than $270 billion spent on advertising throughout the globe occurs in the United States, and over 25% more of this total is spent in Europe (Adler 1996). Both the United States and European Union (EU) have a single central government that is the source of marketwide advertising law. Europe, as a recent union of individual countries, is still struggling with legal differences among its various member states. To a far less degree, the United States also experiences legal differences at the state level and between the states and national government.

This problem in Europe is illustrated by a recent case before the European Court of Justice involving advertising restrictions on special sales. The court affirmed the right of a Belgian retailer to distribute advertising material in Luxembourg containing a special offer and price comparison with its own former prices. Such advertising is legal in Belgium but illegal in Luxembourg. The court held that Luxembourg consumers had the right to buy goods in Belgium and therefore the right to receive all sales information that is legally put into circulation in Belgium (*GB-INNO v. CCL* 1990). This problem is illustrated in the United States by the recent case *44 Liquormart v. Rhode Island* (1996), in which a majority of the Supreme Court struck down a state ban on liquor price advertising, holding that the ban was more extensive than necessary under the First Amendment.

I examine advertising law, primarily formal rather than self-regulatory, in the United States and EU. In particular, I examine the similarities and differences both within these two major markets and between them. The first section provides background regarding the enforcement of advertising law. Next I examine the three areas of the law of misleading, comparative, and unfair advertising. In the United States, comparative advertising is not considered a distinct area of advertising law other than the tort of disparagement, whereas in the EU, the proposed directive would establish specialized and unique rules meriting separate treatment (Petty and Spink 1995). Last, I present an analysis of both similarities and differences and conclusions.

These three areas—misleading, comparative, and unfair advertising law—are interesting because of the developing trend toward harmonization. In the United States, misleading advertising has been condemned by the Federal Trade Commission (FTC) since 1915, originally under its authority to condemn unfair methods of competition. The FTC's authority was augmented in 1938 to explicitly include unfair and deceptive acts and practices and no longer require competitive injury. In 1975, the European Commission (EC) first proposed a directive dealing with misleading and unfair advertising. This proposal was developed by examining the individual laws of European countries, which were founded in the laws of unfair competition, but also by examining U.S. law. After much controversy, the EC adopted a directive on misleading advertising (84/450, 19 Sept. 1984, *Official Journal* L 250/17) that provided some harmonization both internally and between Europe and the United States (Petty 1995a).

The announcement of this directive also stated that unfair and comparative advertising would be addressed in a second stage. In 1991, the EC proposed amendments to require members to allow non-misleading comparative advertising, which is considered unfair advertising in most of Europe. Again, this proposal's purpose is to harmonize European practice but also appears mindful of U.S. law. In the early 1970s, the FTC lobbied to have comparative advertising accepted by the television networks and eventually issued a policy statement supporting comparative advertising (Petty and Spink 1995). It now rarely challenges comparative advertising, which is often the subject of private challenge (Petty 1992).

When the EU completes its deliberations regarding the comparison advertising proposal, it might turn to unfair advertising. Interestingly, Europe has a more developed sense of unfair advertising than has the United States, particularly in regard to television advertising. Furthermore, individual European countries have established some unique contributions to this area of advertising law. In contrast, the

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FTC long has struggled with defining consumer unfairness and unfair advertising. Its first attempt was in the 1964 Statement of Basis and Purpose of the proposed Cigarette Labeling Rule. This was followed by the Supreme Court decision in *FTC v. Sperry & Hutchinson Co.* (1972), which endorsed a three-part standard for unfair practices: (1) They offend public policy; (2) they are immoral, unethical, oppressive, or unscrupulous; and (3) they cause substantial consumer injury. The current narrower definition focusing on consumer injury was first proposed in a 1980 letter to Congress and essentially codified in 1994 amendments to the FTC Act, as discussed subsequently.

Legal Overview

Regulatory Structure and Process

Advertising is enforced through industry self-regulation, government regulation, or private lawsuits (most commonly by competitors, but sometimes by consumers or consumer organizations). Numerous advertising challenges are avoided by careful internal review (Zanot 1985). Inevitably, formal challenges do occur. Each year U.S. television networks review about 50,000 advertisements and receive challenges to less than 100 of those advertisements (Gordon 1988). Some individual television stations (Rotfeld, Abernathy, and Parsons 1990) and magazines also review advertising before accepting it (Rotfeld and Parsons 1989).

The other major source of industry self-regulation is the National Advertising Division (NAD) of the Council of Better Business Bureaus. It receives about 200 advertising complaints each year and open about half that number into formal cases (Boddewyn 1988). These cases can be appealed to the National Advertising Review Board, but that rarely happens. Rarer still, if the advertiser does not comply with its ruling, the NAD can refer the case to the appropriate government authority. This happened for the first time in 1992 (*Sunshine Makers, Inc.* 1992).

The FTC is the major source of formal advertising legal regulation. It opens about 50 advertising investigations and issues 10–15 orders annually. It can try advertising cases administratively, before its own Administrative Law Judges, or it can seek injunction in federal district court (Petty 1992). In addition, state attorneys general have attempted to regulate advertising in recent years (Plevan and Siroky 1988, pp. 343–62).

Private lawsuits by competitors are the third source of U.S. advertising law. Competitors sue one another for false or misleading advertising under the Lanham Act at least as frequently as the FTC brings cases (Petty 1992, pp. 58, 98–99). Rarely do consumers initiate a formal lawsuit to challenge advertising in the United States and when they do, they typically must use state rather than federal law.

Articles 4 and 5 of the 1984 EC Misleading Advertising Directive recognize the validity of industry self-regulation but require legal provisions for the challenge of misleading advertising either in court or before an administrative authority by "persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising." The United Kingdom led the fight against these provisions because it relies extensively on self-regulation of advertising. The United Kingdom's Advertising Standards Authority (ASA) is the largest, most active, and best financed self-regulatory system in the world. The ASA is supported by the government, and two-thirds of the ASA Council are from outside industry. The basis for the ASA authority is the British Code of Advertising Practices (Baudot 1989, pp. 116–26; Boddewyn 1988, pp. 267–94). Recently, a court held that ASA orders are judicially reviewable because the ASA serves a public law function, and the Director of Fair Trading can seek a court injunction of advertising only after the complainant has sought unsuccessfully to resolve the complaint through other recognized means (e.g., industry self-regulation; Newell 1989). The Director of Fair Trading received this authority in 1988, when the United Kingdom passed the Control of Misleading Advertisements Regulation (SI 1988/915) to implement the European Directive on Misleading Advertising.

Belgium, Ireland, Italy, and Switzerland also have active industry self-regulation (Maxeiner and Schotthofer 1992). In Italy, the courts are often skeptical that consumers are ever misled, and they seldom find advertising to be misleading. As a result, industry self-regulation deals with about 80% of all advertising disputes and the courts handle the remaining 20% (Schricker 1990, pp. 631–36). In the Netherlands, both private lawsuits and industry self-regulation are active arbiters of advertising challenges. However, like the United Kingdom, the Dutch self-regulatory body, the Advertising Foundation, can be overruled by the courts (Dommering 1992, p. 269).

The Scandinavian countries actually have displaced industry self-regulation with the establishment of the consumer ombudsman. This person functions in many ways like the FTC by receiving advertising complaints, attempting to resolve them, and litigating them if need be. Advertising cases are litigated before the Market Court, which has nine members, three of whom are from business. Many of the advertising guides are based on prior industry self-regulation, and industry supports and cooperates with the ombudsman (Boddewyn 1985).

In contrast, Germany and Austria base their regulation of advertising on private lawsuits brought by competitors and consumer organizations. These plaintiffs easily can obtain the equivalent of a court-ordered preliminary injunction, and the loser pays for the other party's pretrial and trial expenses, including possible damages from the preliminary injunction. This system requires the complaining party to serve a Notice of Violation on the advertiser, which initiates settlement negotiations. Roughly 90% of all advertising disputes are settled in this way in Germany. Spain has a similar system of notice and negotiation (Maxeiner and Schotthofer 1992, p. 170). The German Weberat, the primary self-regulatory body, complements the legal system by focusing on questions of taste and opinion rather than deceptiveness (Grimes 1971, pp. 1778–93; Horn, Kotz, and Leser 1982, pp. 284–87).

France, Luxembourg, and Belgium also allow recognized consumer organizations to bring lawsuits challenging advertising. These three countries and the rest of Western Europe generally fall somewhere between the two extremes of Italy and Germany, with a balance of private lawsuits, self-regulation, and some government regulation. The structure of advertising regulation is summarized in Table 1.

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Table 1. Legal and Regulatory Structure

	United States	European Union
Industry self-regulation	NAD, media	United Kingdom Italy Belgium Ireland Switzerland Netherlands
Government regulation	FTC, state AG	Scandinavian countries
Private litigation	Lanham Act	Germany Austria

Liability

In all countries, the advertiser can be held liable for its advertising. In the United States, the FTC also pursues advertising agencies that were active participants in creating the advertisements and knew or should have known of the legal problems. Similarly, under the Lanham Act, advertising agencies may be sued but seldom are (Petty 1992).

In Europe, advertising agencies may be sued in Belgium (if the advertiser is located in another country), Denmark, Ireland, Italy, France (if negligent), Germany, Austria, Portugal, Switzerland, and the United Kingdom. In Germany, Ireland, Italy, Switzerland, and the United Kingdom, the media publishing the advertisement also may be held liable (Maxeiner and Schotthofer 1992). In the United States, the media is generally not liable, though the FTC has started identifying them to encourage greater media control of advertising.

Remedies

Not surprisingly, the variety of mechanisms for advertising regulation leads to a variety of penalties. Self-regulation throughout the world has no legal authority to impose a remedy, but, as noted previously, many such systems are buttressed by the threat of formal legal action or denial of access to member media if the recommendation is not followed. The typical remedy imposed by self-regulation is to stop or modify the advertising to prevent dissemination of the troubling claims.

The most common formal legal remedy is an injunctive order to stop dissemination of all or part of the challenged advertising. The FTC administrative cease and desist orders also can "fence in" the advertiser to prohibit similar types of claims or require the disclosure of information, particularly when omissions of information have been challenged. This remedy is imposed at the end of an administrative trial, which can take one year under the new rules. To avoid this delay, the FTC also has obtained court-ordered injunctions, sometimes to last only during the pendency of the administrative trial. A preliminary injunction also is the principal remedy in Lanham Act cases. Often cases are effectively over after a preliminary injunction is issued.

The 1984 EC Directive on Misleading Advertising calls for judicial or administrative authority to enjoin dissemination of misleading advertising. It allows for interim injunctions during the pendency of the proceeding and even prior to the initial publication of the advertisement without proof of actual loss or damage. It also explicitly authorizes requiring the advertiser to publish the decision or a corrective message in appropriate cases. The Directive is silent on competitor or consumer damages as a remedy, but many member states allow for such actions.

On the basis of the Directive, it is not surprising that the primary formal remedy in most European countries is an injunction of the advertisement. As noted previously, if self-regulation is ignored in the United Kingdom, the Director of Fair Trading is authorized to seek an injunction of the advertisement. In Germany, approximately 80% of misleading advertising cases include an interlocutory injunction proceeding, in which the injunction during the trial is rebuttably presumed appropriate and often effectively ends the challenge (Schricker 1990, p. 630).

The FTC also obtains consumer refunds in cases in which knowing dishonesty is evident (about one-third of all advertising cases), and Lanham Act courts rarely order damages that must be proven with specificity. Both the FTC and courts can order corrective advertising, but again this remedy is rare (for exceptions, see *Ciba Geigy Corp.* 1996; *Eggland's Best Inc.* 1994). Informational disclosures are ordered more commonly by the FTC (Petty 1992). State attorneys general will obtain an injunctive order and typically the costs of their investigation, which can be five-figure sums (McKinney and Caton 1990–91).

Most European countries provide a remedy to return to the status quo ante by requiring the advertiser to publish a retraction (called rectification in the Netherlands), but the use of this corrective remedy is rare. Plaintiffs also can request that a court's judgment be published at the advertiser's expense.

Similarly, most European countries allow for the awarding of damages, if they can be proven, but such awards also are rare in advertising cases (Maxeiner and Schotthofer 1992). Last, a few countries evoke criminal penalties, at least on occasion. In the United Kingdom, fines (and possible jail time) typically are ordered under the Trade Descriptions Act of 1968 for explicitly false advertising claims. Similarly, France and Greece also can impose jail time or criminal penalties (Maxeiner and Schotthofer 1992).

Misleadingness

Petty and Kopp's (1995) recent study develops a new framework for analyzing misleading advertising challenges. Because this framework is conceptual rather than tied to the law of any one country, it is useful for making inter-country comparisons (Petty 1996, 1995a). For purposes of this comparative analysis, I examine three stages of this framework. First, advertising must be interpreted to determine the messages that likely are communicated to consumers. Second, if those messages are assumed to be false, are they likely to deceive consumers to make different purchasing decisions than they would have made with accurate information? Third and related to the second, the messages must be verified to determine if they are true or supported by reasonable evidence. Each of these stages is discussed in turn and summarized in Table 2.

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Table 2. Misleadingness

	United States	European Union
Interpretation		
Evidence for implied claims	Lanham Act required	Germany allows
Omissions	FTC, NAD allow omissions FTC and NAD primarily	Belgium, France, Spain, Scandinavian countries, Italy, and the Netherlands self-regulated
Deception	FTC—reasonable consumer Lanham Act 25% or more of audience	Germany gullible consumer Italy skeptical consumer
	puffing defense	puffing defense in Belgium, France, Greece, Ireland, Italy, and United Kingdom
Verification	advertiser must prove except Lanham Act	advertiser must prove exceptions: Germany, Portugal

Interpretation

To show that an advertisement is misleading, it must first be "interpreted" to determine the message it communicates to consumers. In the case of explicit claims, this process is straightforward and can be accomplished by examining the advertisement itself. In such cases, interpretation usually is not identified even as a separate step in an advertising challenge. However, such literal interpretation can miss messages that are implied by the advertisement to members of the audience. To address such implied claims, a more sophisticated method of interpreting the advertising is needed.

In the United States, neither the NAD, FTC, state law, nor the Lanham Act requires advertising to be literally false. Implied deceptive claims can be condemned even if the literal statements in the advertising are true. The FTC, NAD, and state attorneys general can interpret the meaning of advertising themselves but typically will consider interpretation evidence if offered. In contrast, the Lanham Act competitor–plaintiff bears the burden of proving the meaning of its competitor's advertising, unless the claims are explicit. This is done through consumer testing that typically must show that 25% or more of tested consumers are misled by the advertising (Petty 1992).

The 1984 EC Directive on Misleading Advertising is silent on interpretation. It does not mention implied claims, messages contained in visual parts of advertising, or claims that are deceptive without additional information. Not surprising, most European countries also do not explicitly address this stage. Most simply have the arbiter of the challenge, whether it is a judge, government official, or self-regulatory body, examine the advertisement and apply personal judgment to interpret it.

Germany is the only country in the world other than the United States that routinely considers consumer research to determine the meaning of advertising. Germany uses a low standard: If 10–15% of the audience perceives a misleading message, the advertising is condemned. This standard protects more than just the ordinary or reasonable consumer, but the gullible as well (Schricker 1990, p. 630). Advertising researchers suggest that 10–15% is lower than the normal level of miscomprehension that consumers would have for any advertisement (Jacoby and Hoyer 1990).

Two types of implied claims that illustrate differences in advertising interpretation among countries are omissions of material information and visual claims. In the United States, the FTC pursues omissions more readily than do courts under the Lanham Act. The FTC expressly recognizes omissions in its Deception Policy Statement, but the Lanham Act only condemns misleading statements of fact, which excludes most omissions (Petty 1992). State attorneys general are more likely than the FTC to find omissions requiring additional disclosures (Beales 1991).

In 1988, when Spain passed a new General Act on Advertising to adopt the EC Directive on Misleading Advertising, it specifically added: "In the same way, advertising is misleading if it is silent about essential details concerning foods, activities, or services, if the omission deceives the recipient" (Schricker 1990, pp. 640–41). Scandinavian countries, France, and Belgium also statutorily condemn omissions of fundamental or essential information. The French courts have held that an advertisement for tires that did not mention they were retreads was misleading (Maxeiner and Schotthofer 1992). In Italy, the unfair competition code does not define specifically misleading advertising, but the self-regulatory code defines misleading advertising to include omissions. This code can be used by the courts as indicia that competition is unfair (Maxeiner and Schotthofer 1992, p. 217). Similarly, the Netherlands' self-regulatory code requires advertising to be as complete as possible (Maxeiner and Schotthofer 1992, p. 235).

Advertising messages that are communicated visually are perhaps more difficult to address than are omissions of fact. Advertisers are highly skilled in presenting visual images that stimulate sales. Lawyers, regulators, and judges who make or review advertising challenges are trained to analyze the language of statutes or case decisions and are therefore less able to deal with visual advertising claims. For this reason, actual cases rather than statutory language must be examined to determine the extent to which visually misleading claims are subject to challenge.

Germany, for example, occasionally does condemn visually misleading advertising. Similarly, France challenged

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the advertising of TANG drink mix that showed an empty orange peel, a glass of TANG surrounded by green leaves, and the slogan "the taste of fresh squeezed oranges." This advertising was found to claim falsely that TANG contained orange juice despite a fine-print listing of TANG's artificial ingredients (Baudot 1989, pp. 136–37). Similarly, the French courts have condemned an advertisement for a legal advisor shown wearing a robe, which created the impression that the advisor was an attorney (Maxeiner and Schotthofer 1992, p. 125).

Similarly, in the United States, the FTC and less often cases under the Lanham Act have dealt with visual claims in advertising. The FTC and the Texas State Attorney General both challenged advertisements by Volvo showing a big-wheeled "monster" truck rolling over a line of cars, crushing all except the surreptitiously reinforced Volvo. In contrast, the FTC refused to pursue animated visual claims by Perrier that arguably falsely told consumers that Perrier water was not processed by showing historical figures such as Napoleon, dipping a cup into an unrefined natural spring and drinking the Perrier water (Petty 1993).

Deception

Deception, the next stage of an advertising challenge, is closely linked to interpretation. After interpreting an advertisement to derive the messages that are perceived by consumers (and will be tested for veracity in the next stage), the next question is whether consumers will be deceived by the messages, if false. Are the advertisements believed by consumers, and are the false claims material to the purchasing decision? For example, in the Volvo and Perrier cases discussed previously, the FTC apparently believed that consumers would be misled by the Volvo demonstration but not by the animated Perrier demonstration.

The 1984 EC Directive on Misleading Advertising defines misleading advertising as that which "deceives or is likely to deceive persons to whom it is addressed or whom it reaches and which by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor" (Art. 2(2)).

All advertising regulation in the United States and EU follows this modern standard. In fact, materiality or the likelihood of deceiving consumers is presumed in most U.S. cases (Petty 1992, pp. 96–97). Similarly, German law normally does not question that consumers will believe and act on advertising messages. Last, in *Director of Fair Trading v. Tobyward* (1989 2 All ER 266), the British court acknowledged the difficult issues involved in satisfying the deception state of an advertising challenge. It stated:

> It is true that many people read advertisements with a certain degree of scepticism. For the purposes of applying the regulations, however, it must be assumed that there may be people who will believe what the advertisers tell them, and in those circumstances the making of a false claim is likely to deceive.

The question of whether an advertisement is likely to deceive consumers involves two separate issues: (1) What probability is required to make deception "likely"? and (2) What portion of consumers must be deceived before an advertisement will be condemned? The probability issue is seldom addressed, which suggests that a 51% probability is all that is required.

The question of the level of consumer protection is crucial and appears to lead to variance in both the United States and United Kingdom. The U.S. state attorneys general tend to apply a gullible consumer standard (Beales 1991). The Lanham Act follows the old FTC practice of condemning advertising that has the tendency or capacity to mislead 25% or more of consumers because they perceive a false message. The FTC's current practice in its Deception Policy Statement is to condemn only advertising that is likely to mislead reasonable consumers in a material way (Federal Trade Commission 1984a; Petty 1992).

Countries other than the United States and Germany simply have the judge or regulator view the advertising and decide whether it is likely to mislead consumers so that individual judges or regulators set the standard for deception. As noted previously, Germany offers a high level of consumer protection by condemning advertising that would deceive a minimum of 10% of the audience. Italy, Spain, France, and the rest of continental Europe offer a lower level of consumer protection than does Germany by using an average consumer test in which the consumer is skeptical—or in the case of Italy, particularly skeptical—of advertising claims (Schricker 1990).

For example, Italian courts failed to condemn a fertilizer that was made up of only 30% natural ingredients for claiming to be natural, a universal lighter refill that only fit certain lighters, and a drink of whiskey and soda water for being labeled "100% pure Scotch Whisky imported and bottled by Whisky and Soda Ltd." (Schricker 1990, p. 633). In contrast, a German court condemned a true claim of "doubly distilled" for Steinhager liquor because double distillation was the standard for Steinhager liquors (Mollering 1991, p. 19).

U.S. law and that of Belgium, France, Greece, Ireland, Italy, and the United Kingdom recognize the defense of puffing—claims of quality too vague to be relied on by consumers—but France requires that superlatives be verified. For example, in France, a competitor challenged Samsonite luggage advertising that showed a pair of bulldozers "playing" with a suitcase that was shown undamaged. The lower court found the commercial misleading because many suitcases had been used and damaged during the filming of the commercial. The court of appeals held that the average consumer would recognize this as exaggeration and never believe this advertisement was meant to be literally believed (Rijkens and Miracle 1986, p. 150). Denmark, Portugal, and Germany do not recognize this defense, however (Maxeiner and Schotthofer 1992). The degree to which puffing is recognized as a defense is related directly to the degree to which the law treats consumers as being skeptical of advertising.

Another possible defense to the charge that advertising is likely to mislead consumers is to prove that they were not likely to be misled, or better yet, were not actually misled. In a recent challenge to calcium-content claims made by the FTC, the advertiser, Kraft, argued that the relative amount of calcium in its Singles cheese slices were immaterial to consumer decisions to purchase cheese. Relying on Kraft's own evidence and the fact that the claims were intended, the FTC and ultimately a court of appeals found the claims to be material (*Kraft Inc. v. FTC* 1992). By arguing the point, the FTC implicitly recognized the validity of this defense.

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In contrast, in the United Kingdom, under the Trade Description Act of 1968 (as distinguished from the Control of Misleading Advertisement Regulation of 1988), a false statement that a car was in "excellent condition throughout" was found to be a false description even though the advertiser proved that the purchaser/challenger had not relied on the statement. The court overturned the lower court decision and held that the lack of reliance was a mitigating circumstance to be considered when assessing a penalty, but not a defense (*Chidwick v. Beer* 1974).

Verification

Historically, advertisers have not been required to prove the truthfulness of their claims; rather, challengers have had the burden of proving falsity. This is still true in the United States under the Lanham Act unless the advertisements themselves promise substantiation, for example, "tests prove...." However, since the early 1970s, the FTC has required advertisers to provide a "reasonable basis" to substantiate their advertising claims (Federal Trade Commission 1984b). The state attorneys general and NAD also currently follow this approach.

The EC Directive authorizes the court or administrative authority to consider factual claims to be misleading when the advertiser fails to supply adequate evidence of their accuracy "*if appropriate in light of the circumstances of the case.*" The highlighted caveat appears to enable member states to determine whether advertisers will have a general duty to substantiate factual claims or whether this duty might be limited to certain limited types of factual claims, such as "tests prove...."

European countries are slowly adopting this requirement. For example, United Kingdom self-regulation and its recent 1988 Control of Misleading Advertisements Regulation require that advertisers develop substantiation prior to dissemination (Miracle and Nevett 1987, p. 152). Greece, Italy, and the Netherlands also have adopted this "reversal of the burden of proof" as a general requirement, but Germany leaves it to the court's discretion, and Portugal only applies it to comparative advertisements (Maxeiner and Schotthofer 1992).

Comparative Advertising

The FTC long has supported comparative advertising, believing it provides useful information to consumers (Federal Trade Commission 1979; Pridgen and Preston 1980, pp. 673–79). In the United States it probably accounts for 25–50% of all advertising. It is frequently the subject of Lanham Act lawsuits and NAD challenges but seldom is challenged by the FTC (for an exception, see *Ciba-Geigy Corp.* 1996). If confusing to consumers or falsely disparaging of the rival product, comparative advertising can be challenged under common law (Petty 1992, pp. 115, 120–21).

The United Kingdom and Ireland have rules that appear similar to those of the United States. They allow truthful comparative advertising that is not confusing (passing off) or falsely disparaging. The 1994 Trademark Act allows use of rival trademarks in comparative advertisements when consistent with "honest practices" (Bodewig 1994).

In practice, the United Kingdom is more restrictive of comparative advertising than is the United States. A court recently granted an interlocutory injunction of a campaign comparing two brands of computers because the pictured systems were not essentially the same and the specified prices were list prices when dealers typically offered discounts. Similarly, a self-regulatory case condemned a comparison between two brands of margarine because the comparison was between different types of spreads and did not acknowledge the health benefits of the rival brand's high content of polyunsaturated fat. United Kingdom self-regulation also condemned Burger King's use of the slogan, "It's not just Big, Mac" as likely to confuse people into thinking a Big Mac (McDonald's premium hamburger) could be obtained at Burger King even though the rest of the advertisement described the Whopper (Hall-Smith 1994).

In contrast, the legal tradition in continental Europe is to condemn or strictly regulate comparative advertising as denigration (comments, whether true or false, that are unduly negative), unfair competition, or unauthorized use of trademarks. Therefore, for most of Europe, comparative advertising is unfair advertising (Balate 1988). Belgium and Luxembourg forbid even truthful comparative advertising that unnecessarily identifies (explicitly or by implication) another company. Exceptions are limited strictly to situations in which it is necessary to show options including replacement parts or progress in the field or to defend from a rival's comparison. Furthermore, the Benelux Uniform Trademark Act forbids using another's trademark in advertising.

The Netherlands, though subscribing to the Benelux Uniform Trademark Act, is a bit more permissive and does not specifically prohibit comparative advertising. Such advertising often is condemned as misleading or disparaging, and self-regulation also requires it be complete and accurate (Bodewig 1994; Maxeiner and Schotthofer 1992). For example, the Netherlands Supreme Court recently condemned a comparative advertisement that promoted the lower amount needed for one brand of plant fertilizer over another. The Court admitted the possibility of individual brand comparisons, but condemned this particular advertisement for not disclosing the difference in composition between the two products (Dommering 1992, p. 268).

In Italy, denigrating comparisons are not allowed, but indirect (no names) comparisons are allowed if relevant and objective and either defensive or customer requested. Germany also generally prohibits denigrating advertising, such as "Probably the best lager" or Avis's "We try harder." Germany allows truthful comparisons that are not negative (e.g., "as good as") or that are based on the facts for defensive or technological progress purposes. Germany also allows comparisons when requested by consumers or necessary to correct false consumer beliefs, but comparisons may be no broader than necessary to serve the legitimate reasons (Beller 1995; Mittelstaedt 1991). Therefore, in both Germany and Italy, comparative advertising also is strongly restricted (Bodewig 1994; Maxeiner and Schotthofer 1992). For example, a German claim that a new potato chip had 40% less fat than other brands did was enjoined because it was not true for all available brands (Tracey 1989, p. 246).

In 1992, France adopted a new Consumer Protection Law that allows comparative advertising with advance notice to the target rival that is fair and objective and relates to essential, relevant, and verifiable properties of goods or services. It should not denigrate a competitor or capitalize on the

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competitor's brand recognition. Similarly, recent statutes in both Greece and Spain allow verifiable and truthful comparisons that involve relevant properties and comparable goods and services. Portuguese and Danish law is roughly comparable to this standard, as is Swiss law except that comparisons are not allowed in television advertising (Bodewig 1994; Kirmani 1996; Maxeiner and Schotthofer 1992).

A recently passed European Community Draft Directive would permit both implicit and explicit comparisons that are not misleading, confusing about the source of the products, or denigrating. Comparisons must involve essential elements of comparable products and be supported by scientific proof (Petty and Spink 1995).

The substance of the control of comparative advertising is contained in the proposed addition of Article (3a) to the 1984 Directive on Misleading Advertising:

1. Comparative advertising shall be allowed only provided that it objectively compares the material, relevant, always verifiable, fairly chosen and representative features of competing goods and services and that it:
   (a) does not mislead;
   (b) does not create the risk of confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
   (c) does not discredit, denigrate or bring contempt on the trade marks, trade names, goods, services or activities of a competitor and does not principally capitalize on the reputation of a trade mark or trade name of a competitor;
   (d) does not refer to the personality or personal situation of a competitor.
2. Comparative advertising must indicate the length of time during which the characteristics of the goods or services compared shall be maintained where these are the subject of a special or limited duration offer.

Petty and Spink (1995) offer a recent Lanham Act case to illustrate the general differences in approaches between the United States and Europe. The court refused to preliminarily enjoin advertising for Off!Skintastic that proclaimed it was better than Avon's Skin-So-Soft. The court held that Avon had not proven the advertisement communicated the message that Off!Skintastic was better at repelling insects, instead of better because it feels less greasy. Furthermore, the court was not troubled by the assertion that consumers might be confused regarding which Avon product—its lotion that is frequently used as an insect repellent or its new insect repellent—was the target of the comparison. The court did enjoin a footnote in the advertisement that stated that Skin-So-Soft was not registered with the Environmental Protection Agecy as an insect repellent because the new product was in fact so registered, making the claim false (*Avon Products, Inc. v. S.C. Johnson & Son, Inc.* 1994).

This decision illustrates the relative permissiveness of U.S. law regarding comparative advertising. In contrast, this advertisement might have been disallowed under the European proposal and in many European countries. The advertisement likely would be condemned for not being objective (greasy feel is subjective), not always being verifiable for each possible attribute and product that could be the subject of the comparison, and not fairly choosing to compare against the rival insect repellent rather than the body lotion that is commonly used as an insect repellent.

Unfairness

Other than comparative advertising in Europe, the concept of unfair advertising is somewhat elusive. It also has proven controversial on both sides of the Atlantic. In Europe, the August 1979 revision to the proposed Directive regarding unfair and misleading advertising defined unfair advertising as that which:

(1) casts discredit on another person by reference to his nationality, origin, private life or good name; or
(2) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods, or services; or
(3) abuses or manifestly arouses sentiments of fear; or
(4) promotes discrimination on grounds of sex, race or religion; or
(5) abuses the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner.

This language was based on the International Chamber of Commerce advertising code, which is followed by most self-regulatory bodies in Europe (Balate 1988). This part of the proposed directive has not yet been, and may never be, adopted.

The European Community did adopt a Directive Concerning Television Broadcasting (89/552, 3 Oct. 1989, *Official Journal* L 298/23) that regulates, inter alia, aspects of television advertising. Some provisions address misleadingness such as the requirement that television advertising be recognizable, not subliminal or surreptitious (art. 10); the specific regulation of alcohol advertising (art. 15); and program sponsorship (art. 17). Other aspects of the Directive address what could be considered fairness concerns that television advertising not be discriminatory or encourage behavior prejudicial to health and safety or the environment (art. 12); be limited to 15% of daily transmission time or no more than 12 minutes in an hour (art. 18); and not interfere with the integrity of programming (art. 11). The Directive also prohibits television advertising for tobacco products (art. 13) and prescription drugs (art. 14).

Article 16 of the Directive addresses fairness concerns with television advertising directed toward children. It requires that such advertising not cause moral or physical detriment to minors.

Specifically, it states that television advertising not:

(1) directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
(2) directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
(3) exploit the special trust minors place in parents, teachers or other persons;
(4) unreasonably show minors in dangerous situations.

Even prior to the adoption of this Directive, self-regulation in most European countries applied similar rules to advertising directed at children in any media. French law also limits the use of children as endorsers in advertising and prohibits the use of heroes to children as endorsers. French law

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also bans advertising that extols a product as a status symbol (Maxeiner and Schotthofer 1992).

Member states also restrict other sorts of advertising practices that could be deemed unfair. Some of these restrictions involve types of products such as alcohol, tobacco, medicines, and foods. France and the ASA in the United Kingdom are somewhat unique in restricting speed and performance claims and depictions for automobiles. This appears consistent with the Article 12 of Television Directive's prohibition of behavior prejudicial to health and safety or the environment. Others deal with types of solicitations such as street, door-to-door, fax, and telephone. Several countries ban solicitations that are considered too aggressive, surprising, or invasive of consumers' privacy (Maxeiner and Schotthofer 1992).

Additional restrictions deal with unfair practices in a more general manner. Therefore, as discussed under misleadingness, many countries condemn omissions or require complete information. Requiring complete information arguably reaches beyond misleadingness into unfairness. Another example of an attempt to address fairness issues is the requirement of Belgium, Denmark, France, the Netherlands, and the United Kingdom that consumers must receive a seven-day cancellation period for products "sold at a distance" rather than in person at a store or other place of business. A comparable directive for the entire community has been proposed (Gabbott 1994) but has not been adopted because of controversy over whether consumers would select to be on or off mailing lists. Austria, Germany, the Netherlands, and Greece prohibit using psychological pressure to buy, for example, gratitude for a free gift, or the exploitation of emotions, such as compassion, fear, or superstition (Maxeiner and Schotthofer 1992).

Several countries address safety concerns with advertising. Portugal requires advertisements to make reference to safety precautions. Together with Denmark, Ireland, the United Kingdom (self-regulatory), and the Netherlands, it also requires that advertising not cause physical or mental harm to children. The Netherlands expands this concept with specific regulation of sweets, banning promotion of excessive consumption, meal replacement, and the ridicule of those who do not eat sweets. Children's advertisements must remind the audience to brush teeth after eating sweets (Maxeiner and Schotthofer 1992).

In the United States, the tortured history of consumer unfairness under the FTC Act recently has been chronicled by Preston (1995) and Simonson (1995). The current statutory definition, which dates back to a 1980 Policy Statement (Federal Trade Commission 1980), is both simple and vague. It defines an act or practice as unfair if:

> [It] causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.

In adopting this broad language to specific advertising practices, the FTC has looked at some of the same issues as have been addressed in Europe: inadequate information, safety concerns, taking advantage of vulnerable audiences such as children, and psychological pressure to buy. Each of these is discussed in turn. The FTC has not looked at discriminatory advertising, though it is prohibited for employment (42 U.S.C. sec. 704(b); 29 U.S.C. sec. 623(e)), housing (42 U.S.C. sec. 3604), and credit (12 C.F.R. sec. 202.5a).

Perhaps the most common use of FTC unfairness authority is to mandate the disclosure of needed information (Averitt 1981, p. 257). The Commission's Care Labeling (16 C.F.R. sec. 423), Octane Rating (16 C.F.R. sec. 306), and Home Insulation (16 C.F.R. sec. 460) Rules are a few examples in which the FTC has mandated important information be disclosed in labeling based on unfairness. In *International Harvester Inc.* (1984), the Commission majority explained the difference between a deceptive omission or half truth and an unfair or pure omission. An example of the former might be *Campbell Soup Co.* (1992). In that consent, the FTC charged that an advertising claim that certain soups were good for the heart because they were low in fat and cholesterol were deceptive because the advertisements did not disclose that the soups were high in sodium, which can cause other heart problems.

An unfair or pure omission occurs when advertising is not deceptive, but consumers still would be harmed by the omission of important information. For example, in *International Harvester Inc.* (1984), advertising did not mention safety and the tractors in question were found to be reasonably safe, but the FTC found that failing to disclose information on a rare, but very dangerous, safety problem was unfair because consumers could not avoid the problem without additional information. Similarly, a consent agreement in *Consumer Direct* (1990) involved an undisclosed safety problem in which notification had to be given. In Europe, such problems are treated under requirements that advertising is misleading if it does not provide complete information.

The FTC also has been concerned with the depiction of unsafe product use behavior in advertising (Petty 1995b). In a series of consent agreements, the FTC has prohibited this unfair practice. In *Mentholatum Co.* (1980), the FTC prohibited the showing of people wearing dentures for prolonged periods of time, which is contrary to product instructions. This is the only case involving adults emulating behavior shown in advertising.

In *A.M.F., Inc.* (1980), the FTC obtained a consent order prohibiting bicycle advertisements that showed unsafe riding. In *Mego International, Inc.* (1978), the advertisement showed an electric hair dryer being used near water to dry a doll's hair. Similarly, in *Uncle Ben's Inc.* (1977), unsupervised children watched rice boil on an active gas stove. Last, in *General Foods Corp.* (1975), the order prohibited depiction of a naturalist eating wild nuts and berries in advertising for Grape Nuts cereal, for fear that viewers, particularly children, might copy this behavior and eat poisonous mushrooms or berries. Consent agreements were entered in these cases because children could not understand the risk of copying the behavior shown in the advertising.

These cases exemplify the FTC's concern that advertising might take advantage of the innocence of children. In *FTC v. Keppel & Bro.* (1934), the FTC challenged the use of a lottery to market candy to children. The Supreme Court affirmed the FTC's holding that this practice encouraged gambling among children, which induced children to buy a lower-quality product. The Court seemed to be suggesting that children, unlike adults, could not evaluate properly the

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risks of winning and losing the lottery being offered to them. It further held that such a practice violated established public policy against gambling, was unethical, and therefore was unfair under the FTC Act.

This decision recently was relied on by a California court in *Mangini v. R.J. Reynolds Tobacco Co.* (1993) to find the targeting of minors with cigarette advertising would be unfair. The court also applied the three-part test for unfairness under the FTC Act adopted by the Supreme Court in *FTC v. Sperry & Hutchinson Co.* (1972). The California court held that targeting minors (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial consumer injury.

Most recently, the FTC's newly announced "900-Number" Industry Rule (16 C.F.R. sec. 308) bans 900-number service directed at children under 12 years of age. The rule adopts a two-test approach for making this determination. First, it examines the media in which the advertising is placed. If half of the media's audience is under 12 years of age, than advertising for a 900-number service cannot appear in that programming or publication.

The second test is a typical FTC-expertise test: the FTC will examine a variety of factors such as the placement of the advertisement, subject matter, visual content, language, the age of any models, and any characters used in the advertisement. A recent *Wall Street Journal* article reports that the FTC is investigating whether beer advertising on certain television shows is targeting minors (Beatty 1997).

One final consent order "precedent" that involves the unfair advertising to children is *Hudson Pharmaceutical Corp.* (1977). This case involved the use of a cartoon character, Spiderman, to sell vitamins. The complaint first alleged that children were not capable of deciding whether they should use a vitamin supplement, so that the targeting of children in advertising for such a product was challenged as an unfair practice. The complaint also alleged that the use of the cartoon hero would be particularly appealing to children and might cause them to believe the product had attributes it did not have (e.g., the ability to grant superpowers), and it might cause children to take excessive amounts of the vitamin, thereby injuring their health.

The Children's Advertising Review Unit of the Council of Better Business Bureaus has issued specific guidelines for advertising to children. It handles more problems annually than does the FTC in this important area.

The last area in which the FTC has taken action under its unfairness authority involves psychological pressure to buy. These situations usually involve direct sales rather than advertising. For example, the Door-to-Door Sales Rule (16 C.F.R. sec. 429) requires a three-day cooling-off period, and the new Telemarketing Sales Rule (16 C.F.R. sec. 310; Cain 1996) prohibits abusive repeat calling. The Mail Order Rule (16 C.F.R. sec. 439) does not prevent these abuses, but it requires prompt shipment of goods and refunds. Classic cases in this area involve a "free" furnace cleaning in which the furnace is not reassembled until the customer agrees to a service contract and emotional pressure to buy dance lessons and a baldness remedy (Averitt 1981, p 253). The dance lessons case did involve both advertising and personal selling, but predominantly the latter (*Arthur Murray v. FTC* 1972). A state law case also condemned the use of scare tactics to sell a termite protection plan (*Bandura v. Orkin Exterminating Co.* 1987).

Table 3. Unfairness

	United States (FTC)	European Union
Protect children	yes	yes
Ban psychological pressure	if abusive	Austria Germany Greece Netherlands
Safety	"emulation"	Portugal: disclose warnings
Omissions	"Pure" only	treated as misleading
Discrimination	no	EU proposal

Policy Analysis

For marketers seeking to use the same advertising campaign in the United States and EU, there is some hope. Advertising law in both markets has evolved to share certain fundamental similarities. The United States and most of Europe have some form of industry self-regulation and government regulation and provide for competitor lawsuits. The injunction remedy is the primary remedy in both places.

Furthermore, standards for determining misleadingness have several similarities both within Europe and across the Atlantic. The requirement that advertisers substantiate the truthfulness of their claims is well established in industry self-regulation and government regulation in both the United States and EU. Both require proof, often presumed, that advertising is only *likely* to mislead, not that it actually has misled consumers. Similarly, most countries no longer only examine explicit claims but are willing to condemn implied claims that are misleading as well. Cases against implied claims such as omissions of information or visual images appear to be growing more common.

Despite these apparent similarities for determining misleadingness, the remaining differences between the United States and EU and within the EU remain substantial. Only the United States and Germany allow objective evidence to be used to interpret implied claims in advertising. The subjective interpretation of advertising by judges and regulators introduces significant uncertainty for advertising regarding the legality of the advertisements.

A second important difference is the fundamental question of defining deception. This leads to wide variance among countries in Europe, and in the past has led to differences between some states and the FTC in the United States. The EC Directive sidesteps this issue by simply requiring condemnation of advertising that is likely to mislead its audience, without specifying or describing the proportion or types of consumers to be protected. For this reason, as Schricker (1990, p. 644) and Petty (1995a, p. 154) point out, the EC Directive does relatively little to harmonize adver-

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tising law within the Union. Therefore, Italy still considers consumers skeptical of advertising, and Germany considers them gullible. The FTC only protects the amorphous reasonable consumer.

Two changes to the 1984 Directive on Misleading Advertising would bring substantially greater harmonization to this part of advertising law both within Europe and between the EU and United States (Petty 1995a):

1. The definition of misleading advertising should be amended to include implied claims established by appropriate evidence that are likely to deceive at least an established percentage (e.g., 25%) of the advertisement's target audience that could include less sophisticated consumers.
2. Contrary to the current permissive language, the Directive should mandate that factual claims be deemed misleading if the advertiser does not possess, at the time of dissemination, appropriate evidence of their truthfulness.

There is greater variation in the laws addressing comparative and unfair advertising. In much of Europe, comparisons are considered unfair or trademark infringement, but the FTC generally follows a laissez faire policy. In contrast, the courts under the Lanham Act and the NAD actively police comparative advertising but allow it if not misleading or confusing regarding sponsorship.

Furthermore, the EU proposal to harmonize and permit (under strict conditions) comparative advertising does little to improve harmonization across the Atlantic. Indeed, English language comparative advertising might be less harmonized because the United Kingdom faces greater restrictions under the proposal. Particular requirements of the proposal include that comparisons:

1. be fair and always verifiable,
2. not present any significant risk of confusion among rivals,
3. not principally capitalize on another's good name,
4. not denigrate, and
5. not be personal in nature.

These appear inevitably to lead to differences in the treatment of comparative advertising across the Atlantic (Petty and Spink 1995). Indeed, the vague and ambiguous nature of the proposed language (e.g., *always* verifiable, *significant* risk of confusion, *principally* capitalize) would seem to allow the continuation of much of the intra-European differences until the European Court is called on to resolve them.

There appears to be little consensus within Europe or the United States regarding whether comparative advertising is appropriate. Perhaps a multinational survey of consumers and businesses would help policy makers understand both who objects and why they object to this practice. Appropriate rules then could be drafted to take into account consumer and business opinion when justified in the eyes of those making the rules.

Unfair advertising is rarely condemned on either side of the Atlantic. Perhaps this is because it is rare or perhaps just poorly defined. The EU attempts to define it piecemeal with specific regulations to address specific problems. The FTC defines unfair advertising in broad terms but rarely brings cases to provide specific examples.

Both the United States and EU condemn material information omissions regarding safety and showing unsafe behavior in advertising, particularly when it is directed at children. Much U.S. protection of children from advertising abuses involve deception. The EU and several member states have specific legal rules to protect children from various unfair advertising practices—unfortunately many are defined vaguely (e.g., "abuse of trust").

The EU alone condemns discrimination, use of fear or emotional appeals, and other intimidating tactics in advertising. The United States prohibits discrimination only for advertising for certain types of products and services such as housing, employment, and credit. It generally does not condemn emotional or intimidating appeals except in cases in which the contact is personal and the abuse egregious.

Because unfairness is difficult to define either generally or on a case-by-case basis, both the United States and EU appear to prefer providing for self-help in situations in which unfairness is more likely to occur. For this reason, a proposed Directive and several EU countries already provide for a seven-day cooling-off period for any distance sale. When consumers cannot examine goods before they purchase, they might be misled about quality. In addition, however, they could face high-pressure telemarketing tactics or slow refund processing, which are fairness concerns.

The United States only provides for a three-day cooling-off period for door-to-door sales or at the state level for specific products and services (e.g., timeshares, health clubs) that likely involve personal selling. Recent FTC telemarketing regulations involve restrictions on abusive calling, but no overall cooling-off remedy if the marketing practices are unfairly successful (Cain 1996).

Conclusion

Despite broad cultural similarities, the EU is not yet a single market for advertisers. Nor can the same advertisement be run in both the United States and EU. Businesses and consumers both would benefit from a consistent regulation of advertising. This would further the EU's goal of free movement of goods, because advertisers would not have to worry about inter-country differences. Consistent advertising regulation would assist consumers in making informed purchasing decisions by allowing them to understand what sorts of practices receive regulatory scrutiny both in their home country and when they travel.

Over the long term, further harmonization appears inevitable. Differences in implementation among the member states ultimately will be resolved by the European Court. The court should favor the free flow of goods and, for example, might decide, as the FTC did nearly 20 years ago, that by providing information to consumers, comparative advertising assists the proper functioning of the market. Indeed, in a recent European case, the German government found the trade name Clinique to be deceptively similar to the German word for medical clinic. The European Court of Justice held that this result was an illegal trade barrier between member states. The court did note that the national government was entitled to protect consumers from being misled but felt that such action was not necessary in this case and therefore created an illegal barrier to trade (Kirmani 1996, p. 209).

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Harmonization between the United States and Europe also could occur, if the United States considers examining and adopting at least some European rules. Traditionally, Europe has looked to the United States for ideas on advertising regulation, but the United States has not reciprocated. Several European ideas appear worthy of U.S. consideration. For example, shifting the burden to advertisers to demonstrate that their comparisons are material and relevant could reduce the frequency and magnitude of battles over advertising interpretation in the United States. Advertisers often craft literally true but insignificant claims of superiority hoping to communicate broad claims of overall superiority. Forcing advertisers to prove the relevance of their narrow claim could force them to admit that the broader claim is being communicated.

A U.S. prohibition on personal attacks in commercial advertising also could be beneficial by forcing advertisers to address the attributes of products and services rather than the personality of those producing them. Although personal attacks appear relatively rare in U.S. comparative advertising (outside of politics), banning them could contribute to the reduction of prejudice and cultural stereotyping. Related to this, why not adopt a general prohibition against discriminatory advertising, instead of limiting U.S. rules to particular products and services? If the United States adopts some European ideas, the EU might be more willing to adopt U.S. concepts. If the United States and EU negotiate and formally try to harmonize their advertising laws, the rest of the world likely will consider seriously adopting similar rules. Global advertising then would be a reality rather than a difficult process of adaptation and frustration.

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